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In the Supreme Court of the United States

OCTOBER TERM, 1964

CORLISS LAMONT, DOING BUSINESS AS BASIC
PAMPHLETS, APPELLANT

v.

THE POSTMASTER GENERAL OF THE UNITED STATES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

JOHN F. FIXA ET AL., APPELLANTS

v.

LEIF HEILBERG

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

MEMORANDUM CONCERNING CHANGED CIRCUMSTANCES

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington, D.C., 20530.

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In these appeals, which involve the constitutionality of a statute providing for detention by the Post Office of "communist political propaganda" of foreign origin (39 U.S.C. 4008), the Court noted probable jurisdiction on December 7, 1964 (No. 491; 379 U.S.

926), and on February 1, 1965 (No. 848), and set the cases for argument together. *Lamont v. Postmaster General*, No. 491, is an appeal from a judgment of a three-judge district court in the Southern District of New York dismissing a complaint seeking declaratory and injunctive relief against further enforcement of the statute, on the ground that the case was rendered moot by an order of the Postmaster General directing that the plaintiff's mail not be detained in the future. *Fixa v. Heilberg*, No. 848, is an appeal from a judgment of a three-judge district court in the Northern District of California declaring the statute unconstitutional and enjoining its enforcement.

At the time when both these cases were decided in the district courts the Post Office Department's procedure for administering 39 U.S.C. 4008 was substantially as follows: Any mail of foreign origin which qualified as "communist political propaganda" was detained by the postal authorities, who then sent the addressee a notice identifying the detained matter and advising him that unless he requested delivery before a certain date by returning the notice and checking the appropriate box, the mail would be destroyed. The Post Office kept a file of the names and addresses of persons expressing a desire to receive such mail in order to enable it in the future to distribute this mail to willing addressees without the preliminary notice-and-return steps.

In both of these cases, the plaintiffs refused to return the notices and brought suit to enjoin the enforcement of the statute on the grounds of its unconstitutionality. In each instance, the Post Office

Department subsequently notified them that the institution of their suits constituted an expression of desire to receive "communist political propaganda" and that postal authorities had therefore been ordered to deliver such mail to them without preliminary detention. Asserting that this action by the Post Office Department rendered the suits moot since the plaintiffs could not thereafter be given any relief by a court order which they did not already enjoy, the government moved to dismiss each case as moot. The motion was sustained in the Southern District of New York (No. 491) but it was denied in the Northern District of California (No. 848). In moving for summary affirmance in No. 491, we contended that the district court's decision regarding mootness was correct, and in its order noting probable jurisdiction in that case, this Court directed the parties to discuss "the question of mootness as well as the merits of the case." 379 U.S. 926.

Reaching the merits of the constitutional issue in No. 848, the three-judge district court in that case held that the statute was unconstitutional largely on the premise that the administration of the statute required the Post Office Department to "maintain a list of persons indicating a desire to receive this type of mail," and that the availability of such a list to other government agencies would substantially deter addressees from exercising their constitutional rights to receive such mail. Jurisdictional Statement, No. 848, this Term, pp. 14-15.

Recently, after probable jurisdiction had been noted, the Postmaster General reviewed the procedure

for administering 39 U.S.C. 4008 and decided that, as a matter of internal administrative policy, it was desirable to abandon the practice of keeping card files of the names of persons who desired to receive "communist political propaganda." And while the government would not lightly alter the *status quo* in a matter pending before this Court, the considerations of policy were judged sufficiently urgent to require the immediate elimination of what might be regarded as a file of names of persons interested in "communist political propaganda" and were sufficiently persuasive to outweigh any embarrassment inherent in changing existing conditions. Accordingly, on March 1, 1965, the Postmaster General signed the Regional Letter which is reprinted at pages 7-9, *infra*, and which is to be distributed to Regional Directors and Postmasters within the Post Office Department. The letter alters the procedure followed in executing 39 U.S.C. 4008 in two respects which are material to these appeals: (1) Instead of treating the request by the recipient as a continuing request for the delivery of all such mail, the new procedure requires the Postal authorities to send a separate notification for each item as it is received, and the recipient to make a separate request for each item; (2) no list or file of persons requesting the delivery of such mail is retained by the Post Office Department. The effect of the former change is now to preclude any contention that these cases are moot, since it is clear that both plaintiffs will hereafter be required to return notices for each piece of "communist political propaganda" they wish to receive. On the other hand,

the abolition of any list or file of willing recipients makes the alleged inhibiting effect of the statute on First Amendment rights far less severe than it was under the former procedure.

Although the Post Office Department's change of procedure eliminates any ground for contending that the cases are moot and also alters the factual basis upon which the merits were presented to both district courts (and to this Court in the jurisdictional papers), the government is prepared to argue in this Court, without further delay, the merits of the constitutional issue as it is presented under the new procedures. If the Court should feel that it is more appropriate to remand the cases to the district courts—in No. 491 for consideration of the merits of the constitutional claim and in No. 848 for reconsideration of the constitutional challenge to the statute in the light of the new practice under which no record or list of persons requesting Communist political propaganda will be maintained (compare *Fortson v. Toombs*, No. 300, this Term, decided January 18, 1965; *Calhoun v. Latimer*, 377 U.S. 263)—we will take all necessary steps to expedite their disposition in the district courts and, if necessary, their representation to this Court upon the more complete record.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

MARCH 1965.

APPENDIX

POST OFFICE DEPARTMENT REGIONAL LETTER MARCH 1, 1965

Subject: Destruction of Records Relating to Delivery of Mail Containing Communist Political Propaganda.

I. Purpose

To provide for the immediate destruction of POD Forms 2153-X upon which addressees have indicated their desire to receive communist political propaganda.

II. Action Offices

Chief Postal Inspector.

Regional Directors at New York, New York; Atlanta, Georgia; Chicago, Illinois; Dallas, Texas; Seattle, Washington; San Francisco, California.

Postmasters at New York, New York; Miami, Florida; San Juan, Puerto Rico; Chicago, Illinois; New Orleans, Louisiana; Seattle, Washington; San Francisco, California; Los Angeles, California; Laredo, Texas; El Paso, Texas; Honolulu, Hawaii.

III. Background

Since January 7, 1963, the postmasters at the eleven offices mentioned in paragraph II have been sending to addressees of mail matter considered by Bureau of Customs to be communist political propaganda, POD Form 2153-X. On this form addressees are requested to indicate whether they desire to receive the mail matter mentioned. Upon receipt of this card by the postmaster, it is appropriately filed for future refer-

ence solely for the purpose of eliminating the necessity of making subsequent contacts with the same addressee as additional mail matter arrives. Many addressees have objected to the maintenance of any such record.

IV. Statement of Policy

It has been decided that the Forms 2153-X returned to the eleven postmasters mentioned above will not in the future be retained in the files of the Department, except in those cases where the addressee indicates on the form that he does not desire to receive the specific items of mail mentioned or any other similar communist political propaganda. The Department will not, in the future, maintain any record of the wishes of those addressees who desire to receive communist political propaganda. This will require the eleven above mentioned postmasters to send inquiry cards to all addressees each time mail matter is received unless Form 2153-X is on file showing the addressee does *not* desire the specific item. Upon the return of the cards indicating that the addressee does desire to receive the mail matter mentioned, the mail matter will be delivered and the card promptly destroyed without record being made of its receipt.

V. Implementation of New Policy

Under the direct supervision of the Chief Postal Inspector, or his designee, the eleven postmasters in the offices mentioned in paragraph II will destroy all POD Forms 2153-X now maintained in their files and upon which the addressees have indicated that they desire to receive specified items of communist political propaganda.

The Chief Postal Inspector, or his designee, will report to the Postmaster General that he personally witnessed the destruction of all such cards and the number thereof destroyed.

Destruction of POD Forms 2153-X pursuant to this instruction will be accomplished no later than March 15, 1965.

/s/ JOHN A. GRONOWSKI,
Postmaster General.